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STATE FOR EUR/WE, EUR/ERA, EB/ESC/TFS  
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SUBJECT: SWIFT/INFORMATION EXCHANGES: DUTCH RELEASE REPORT

REF: A) THE HAGUE 642  
B) THE HAGUE 171  
C) THE HAGUE 163  
D) 06 THE HAGUE 2645  
E) 06 THE HAGUE 2572

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ACCORDINGLY.

¶1. (SBU) SUMMARY. A June report to Parliament by the Dutch Ministries of Finance and Justice provided the results of the ministries' review of the SWIFT program and four cases of reported direct contact between Dutch financial institutions and the USG. SWIFT's recent registration with the Department of Commerce's Safe Harbor program and the data handling commitments made by the U.S. Treasury satisfy the Ministries' recommendations. With regard to direct bilateral contacts between USG authorities and Dutch financial institutions, the report concluded that one of the cases involved information located in the Netherlands, for which a Mutual Legal Assistance (MLAT) request should have been submitted if the request was part of a criminal investigation. The report states that this case will be put on the agenda for upcoming law enforcement consultations. The other three cases were related to financial supervision and posed no concerns. END SUMMARY

¶2. (SBU) In response to a March 10 news article accusing the USG of breaking European privacy laws and subsequent parliamentary questions, Dutch Finance Minister Wouter Bos told Parliament March 13 that the Finance and Justice Ministries would conduct an investigation into information flows between Dutch financial institutions and U.S. authorities. Bos informed Ambassador Arnall of the investigation during an introductory call March 21. During the same meeting, Bos acknowledged that U.S.-based branches of Dutch banks were subject to U.S. law and legal requests for financial data or records (see ref A). The Ministry of Finance (MOF) released the results of its report on June 27. An unofficial summary translation of the report follows.

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SWIFT INFORMATION TRANSFER ADDRESSED....  
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BEGIN SUMMARY.

¶3. (U) MOF and the Ministry of Justice (MOJ) found that financial information held by SWIFT's EU operations was mirrored in its U.S. branch for historical and safety reasons. Interactions between the U.S. Treasury and SWIFT were governed by a Memorandum of Understanding (MOU). Under the MOU, the Treasury issued new subpoenas to SWIFT each time it requested information -- for a total of approximately 60 subpoenas since 2001. The Ministries found the information received could only be used in the fight against terrorist finance, and an independent accountant ensured compliance with the terms of the MOU.

¶4. (U) The Dutch Government decided not to notify Parliament about information transfers from SWIFT to U.S. authorities, because doing so could have harmed terrorism finance investigations. They determined it would have been inappropriate for the Dutch Central Bank (DNB) to have notified the Dutch Data Protection Authority (CBP) directly. Due to the type of information received, DNB notified only the MOF.

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....ALONG WITH SHORT- AND LONG-TERM SOLUTIONS  
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¶5. (U) The Ministries recommend three short term solutions to address these data transfers and ensure adherence to European Data Protection directives (see refs B, C, D, and E for additional background). First, Dutch banks should inform clients that their data could be accessed by the USG through SWIFT, second, SWIFT should comply with U.S. and European Commission (EC) "Safe Harbor" regulations, and third, the European Union consider additional agreements to govern information transfers from SWIFT to U.S. authorities.

¶6. (U) Long-term solutions include reorganizing SWIFT so that the  
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information from EU citizens would not be mirrored in SWIFT's U.S. branch. SWIFT expected to make a decision in September. Additionally, MOF and MOJ recommend that the EU address similar information flows from Europe to the U.S. in other sectors.

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DUTCH LEGAL FRAMEWORK FOR INFORMATION EXCHANGE....  
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¶7. (U) The MOF and MOJ identified four types of information exchange: exchanges relating to money laundering and terrorism finance; financial supervision; intelligence and security services; and criminal investigations. Seven laws and MOUs governing U.S.-Dutch bilateral information exchanges are highlighted.

-- The Personal Data Protection Act (the Wet Bescherming persoonsgegevens, or WBP) restricts exchanges of personal information to countries with adequate privacy protections in place. According to an EC assessment, the U.S. does not have adequate protections, and direct exchanges between Dutch firms and U.S. authorities is therefore discouraged except in cases of overriding public interest.

-- The Disclosure of Unusual Financial Transactions Act (Melding Ongebruikelijke Transacties, or MOT), and the Identification (Provision of Services) Act (Wet Identificatie bij Dienstverlening, or WID) require Dutch financial institutions to identify all customers and report all transactions by entities on the "sanctions list" or that could be related to terrorism to the Dutch Financial Intelligence Unit (FIU). As members of the Financial Action Task Force (FATF), Dutch and U.S. FIUs may exchange information with each other. These exchanges occur several times a year.

-- The Act on Financial Supervision. The Netherlands has two financial supervisors, the DNB and the Netherlands Authority for the Financial Markets (AFM), which can exchange information with U.S. authorities under certain conditions, including when the request is clearly defined, secrecy is guaranteed, and the information is used

only for the purpose for which it was requested. The AFM has signed an MOU with the Securities Exchange Commission (SEC) and the Commodity Trading Futures Commission (CFTC) governing such exchanges. Since January 2005, the AFM has received seven information requests from the SEC and 1 from the CFTC. All requests were received and answered in writing and most were related to cases of inside trading. Under the MOU between the AFM and SEC, each organization is allowed direct contact with foreign companies located in their respective jurisdictions. However, the intent of the MOU was for the AFM and SEC to communicate with each other and not directly with financial institutions.

-- The Intelligence and Security Services Act (Wet op de inlichtingen en veiligheidsdiensten, WIV) defines the authorities of the Military Intelligence and Security Service (MIVD) and the General Intelligence and Security Service (AIVD). MIVD and AIVD may exchange information with foreign intelligence and security services.

-- The 1981 bilateral Mutual Legal Assistance Treaty governs information exchanges related to criminal investigations. Under this agreement, the USG could request Dutch assistance to access investigation information not located in the U.S.

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....AND RELEVANT U.S. LAWS AND REGULATIONS  
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18. (U) The USA Patriot Act 2001 and its amendments have extended USG powers and resulted in adjustments to several laws. The MOF and MOJ found at least one case where the USA Patriot Act had given the Bank Secrecy Act (BSA) extraterritorial powers. According to U.S. laws, the Departments of the Treasury and Justice could issue a subpoena to a foreign bank having an account in the U.S. A subpoena for financial information related to a U.S. bank account could also be issued for information located outside the U.S., to a foreign bank located in the U.S., or to a representative of the bank in the US or in another country. The information received through the BSA could be circulated to other American authorities (for example to supervisors and the investigative services). (COMMENT. The report

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does not suggest that this provision has been utilized with respect to Dutch financial institutions. END COMMENT.)

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FOUR CASES OF DIRECT CONTACT WITH BANKS  
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19. (U) The reviewers identified four cases in which U.S. authorities contacted Dutch financial institutions directly. (NOTE. MOF promised the institutions anonymity in return for their participation in the research; therefore, the report mentioned none of the authorities or the financial institutions by name. END NOTE.)

-- In the first case, no laws or regulations were breached, as the information was provided in accordance with the Administrative Assistance Agreement on the exchange of financial supervision information.

-- In the second case, no laws or regulations were breached as there was no MOU between the relevant authorities. In addition, this case related to financial supervision and was an informal information request. No personal information was forwarded to U.S. authorities.

-- The third case related to information transfers between a financial institution and a U.S. regulator with whom Dutch regulators did not have a MOU.

-- In the fourth case, a Department of Justice (DOJ) official asked a Dutch financial institution to provide information located in the Netherlands. The exact nature of this investigation is unknown. If it was a criminal investigation, the information requested should have been made through the bilateral agreement for legal assistance

between the Netherlands and the U.S.

¶10. (U) Dutch financial institutions felt pressured by the USG to provide the information. According to Dutch banks, there was not only tighter supervision but also pressure on European banks to voluntarily implement the stricter U.S. sanctions against Iran.

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FORMAL CHANNELS TO EXCHANGE INFORMATION PROPOSED  
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¶11. (U) As a consequence of the investigation, the MOF and MOJ will take several actions. First, the Dutch ambassador in the U.S. will ask the USG to use formal channels when possible, and request that future information exchanges take place only between government authorities. Second, the Dutch will put discussion of the fourth case of direct contact on the agenda for an upcoming meeting between the MOJ and DOJ (NOTE. This apparently refers to bilateral law enforcement consultations planned for October. END NOTE.) Third, where there are no official channels established, Dutch and U.S. authorities should decide how information exchanges should be handled.

¶12. (U) The Netherlands will also raise the issue with the EU and share the investigation and its results with the EC. First, it will push for an EU discussion of the relationship between privacy rules and compulsory information transfers. Second, it will propose an investigation into extraterritorial elements of U.S. laws and regulations and their consequences for the EU. Third, the Netherlands will request, through the EC, that the U.S. make it possible for financial institutions to become part of the "Safe Harbor" regulations.

END SUMMARY.

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FINANCE MINISTER BOS ADDRESSES TRANSFERS  
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¶13. (U) In a separate letter to Parliament June 28, Bos stressed that SWIFT information could only be used for the fight against terrorist financing and that USG compliance with the MOU between the U.S. Treasury and SWIFT was audited by an independent accountant. Asked whether he considered it acceptable that U.S. authorities

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received information concerning European citizens through irregular information requests, Bos answered that the investigation had not indicated that this had happened. Bos defended SWIFT, saying it was an initiative by banks to make international payments as efficient as possible, and that there are no other similar systems. Bos noted neither the Netherlands nor the EU could restrict information transfers from SWIFT U.S. to the USG. As a possible solution, Bos said customers would be informed that their U.S.-based information could be accessed to counter terrorist financing, and that no means could prevent access to the information when SWIFT was used.

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NEW TREASURY REPRESENTATIONS ALLEVIATE SWIFT CONCERNS  
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¶14. (SBU) In subsequent discussions July 7 and 26, Paul ten Westeneind, Policy Officer in the Financial Integrity Division of the Dutch MOF, told Emboffs that June 28 U.S. Treasury representations to the EU had legally satisfied the GONL's concerns with SWIFT issues and had helped identify feasible solutions raised in the report. He specifically noted Treasury's indication that EU data protection principles would be taken into account during the processing of SWIFT US data, the the July 20 registration of SWIFT with the Department of Commerce's "Safe Harbor" program, and SWIFT's intention to stop mirroring its European data in the U.S. within a few years.

¶15. (SBU) Ten Westeneind said that while USG authorities had "every right" to contact Dutch companies located in the U.S., the Dutch Parliament may still discuss the report in September after its

return from summer break. The MOF would also advocate discussing information transfers to the U.S. in other sectors such as credit cards, he added.

¶16. (SBU) In separate conversations in early July, MOJ and MFA policy officers raised with Global Issues Chief the Dutch intent to put the fourth reported case of direct contact between U.S. authorities and a Dutch bank on the agenda for the upcoming law enforcement consultations. They indicated they had concerns that such requests should be channeled through formal MLAT requests, rather than direct contacts with financial institutions. She noted that additional detail about the specifics of the information request at issue would be needed to respond substantively to the concerns raised.

SCHOFER